FILED BY CLERK
SEP 30 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. VICTOR MANUEL RODRIGUEZ, Appellant.	2 CA-CR 2007-0257 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060030

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Victor Rodriguez was convicted of aggravated driving while under the influence of intoxicating liquor (DUI) and aggravated driving with a blood alcohol concentration (BAC) of .08 or more. After finding he had two prior felony convictions, the trial court sentenced him to enhanced, concurrent, presumptive prison terms of ten years for each conviction. On appeal, Rodriguez contends one of the prior convictions used by the trial court to enhance his sentences does not qualify as a "historical prior felony" and there was insufficient evidence to prove he was the person convicted of that offense. He also claims he was entitled to a jury trial on the state's allegation of prior convictions and his sentences are excessive. For the reasons below, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In December 2005, Tucson police officer Hernandez was responding to a 911 call on South Lundy Avenue when Rodriguez drove past him and pulled into a driveway down the street. Hernandez observed Rodriguez get out of his vehicle holding a can of beer. Hernandez approached and questioned him, noticing he had bloodshot, watery eyes, slurred his speech, and smelled of alcohol. Rodriguez admitted he had consumed a twelve-pack of beer that day, and a subsequent sample of his blood revealed a BAC of .151.

¶3 In January, Rodriguez was charged with aggravated DUI and aggravated driving with a BAC of .08 or more, both class four felonies. The state alleged in the indictment that he had two prior felony convictions and sought enhanced sentences pursuant

to A.R.S. § 13-604(C).[1] Following the jury's guilty verdicts, the trial court held a bench trial on the alleged priors. The evidence showed Rodriguez had been convicted in 1999 of endangerment, a class six felony, and in 2003 of aggravated DUI, a class four felony. The trial court found both convictions were historical prior felony convictions and sentenced him to enhanced, presumptive prison terms of ten years for each conviction. This appeal followed.

Historical Prior Felony Conviction

i. Proof of Identity

¶4 During the priors trial, the court admitted into evidence a certified copy of Rodriguez's 1999 conviction for endangerment. The last page of the sentencing order for the conviction contained a fingerprint and stated: "Let the record reflect that the defendant's fingerprint is permanently affixed to the signature page of this sentencing order." The state's fingerprint identification expert testified she had examined the fingerprint but, because it was of poor quality, she had been unable to compare it to the fingerprint card prepared in connection with Rodriguez's present offense. Rodriguez argued the state had failed to prove he was the person convicted of endangerment in 1999, but the trial court found otherwise. Rodriguez challenges that ruling, a decision we review for an abuse of the trial court's discretion. *See State v. Rodriguez*, 200 Ariz. 105, ¶ 3, 23 P.3d 100, 101 (App. 2001).

[1]Section 13-604(C), A.R.S., prescribes a presumptive prison term of ten years for a person convicted of a class four felony who has two or more historical prior felony convictions.

¶5 The preferred method for proving a prior conviction is to offer into evidence a certified copy of the prior conviction bearing the defendant's fingerprints. *See State v. Robles*, 213 Ariz. 268, ¶ 16, 141 P.3d 748, 753 (App. 2006). Fingerprints, however, are not the only means of identifying a person previously convicted of a felony, and courts may consider other kinds of evidence. *See id.* Rodriguez's middle name, birth date, and signature are contained in the certified copy of the endangerment conviction. That information is also on the fingerprint card for the present offense. The middle names and birth dates match, and the signatures are the same on each document. And we note Rodriguez at no time claimed it was not him. We cannot say the court abused its discretion in finding the evidence sufficiently established Rodriguez was the person convicted of endangerment.

ii. A.R.S. § 13-604(W)(2)(c)

¶6 The state alleged Rodriguez's conviction for endangerment was a "historical prior felony conviction" pursuant to A.R.S. § 13-604(W)(2)(c), which defines that term as "[a]ny class 4, 5 or 6 felony . . . that was committed within the five years immediately preceding the date of the present offense." Under the statute, any time the defendant spent incarcerated "is excluded in calculating if the offense was committed within the past five years." A.R.S. § 13-604(W)(2)(c). Rodriguez contends, for the first time on appeal, that his endangerment conviction is not a historical prior conviction because it was committed more than five years before the date of the present offense.

¶7 Both Rodriguez and the state assert that, because Rodriguez failed to raise this issue below, we should apply a fundamental error analysis. But we are not persuaded this

is the law in Arizona. In *State v. Song*, 176 Ariz. 215, 217-18, 860 P.2d 482, 484-85 (1993), which neither party cites, the defendant argued on appeal that he was improperly sentenced to an enhanced prison term because his prior conviction from another state did not constitute a historical prior pursuant to A.R.S. § 13-604.02. *Id*. Division One of this court agreed and found that, although the defendant raised the issue for the first time on appeal, the trial court had committed fundamental error by imposing an enhanced sentence. *Id*. On review, our supreme court reversed the appellate court and reinstated the sentence imposed by the trial court, stating that whether a prior conviction constitutes a historical prior "is an issue of law, which like other legal issues is precluded unless raised." *Id*. at 218, 860 P.2d at 485. The court found: "By failing to contend [in the trial court] that such a crime would not be a felony in Arizona, the defendant is precluded from arguing otherwise on appeal." *Id*.; *see also State v. Fagnant*, 176 Ariz. 218, 220, 860 P.2d 485, 487 (1993) (defendant who has admitted prior felony from another jurisdiction cannot object for first time on appeal to use of that prior as aggravating factor under A.R.S. § 13-702).

¶8 More recently, in *State v. Smith*, 217 Ariz. 308, ¶¶ 2, 10, 173 P.3d 472, 473, 474 (App. 2007), the defendant argued on appeal the trial court had erroneously found he had three historical prior felony convictions. The state asserted the defendant was precluded from raising this argument because he had failed to raise it before the trial court. *Id*. ¶ 10. Division One of this court, relying on *Song*, *inter alia*, held that a defendant may not argue on appeal that a prior conviction does not constitute a historical prior "unless the argument has been preserved in the trial court." *Smith*, 217 Ariz. 308, ¶ 17, 173 P.3d at 475. The court

noted that, although "some of our opinions may have created some confusion" on the issue, the court of appeals will not apply a fundamental error analysis to a claim that a prior conviction was erroneously found to constitute a historical prior conviction. *See id.*, n. 2.

¶9 *Song* and *Smith* establish that a defendant is precluded from asserting for the first time on appeal that a prior conviction does not constitute a historical prior, the issue being one of law, "which like other legal issues is precluded unless raised." *Song*, 176 Ariz. at 218, 860 P.2d at 485. Rodriguez's claim that the endangerment conviction is not a historical prior under § 13-604(W)(2)(c) was not raised below and is therefore precluded.[2] *See Smith*, 217 Ariz. 308, ¶ 17, 173 P.3d at 475.

Excessive Sentences

¶10 Rodriguez next argues the imposition of presumptive sentences was excessive because his sentences were already enhanced and that the trial court failed to give sufficient weight to certain mitigating factors, including Rodriguez's addiction to alcohol, his remorse for committing the offense, and his troubled childhood, close family ties, and history of a strong work ethic. We will not disturb a sentence that is within statutory limits unless it

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[2]We note that in *State v. Heath*, 198 Ariz. 83, 7 P.3d 92 (2000), the defendant received an enhanced sentence after he admitted three prior felonies from Nevada. 198 Ariz. 83, ¶ 2, 7 P.3d at 93. On appeal, he argued the state had failed to prove the offenses would constitute felonies in Arizona. *Id.* ¶ 3. Our supreme court found that, notwithstanding the defendant's admissions, it was "unclear from the record whether the trial judge determined that Heath's Nevada convictions would constitute felonies in Arizona," and it remanded the case for clarification on that issue. *Id.* ¶ 5. Assuming without deciding that *Heath* would apply here, it is clear from the record, as Rodriguez acknowledges, that the trial court found the endangerment conviction was a historical prior under § 13-604(W)(2)(c), notwithstanding that this finding may have been incorrect.

clearly appears that the court abused its discretion. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

¶11 Prior to the sentencing hearing, Rodriguez's trial counsel submitted a letter asking the trial court to impose substantially mitigated sentences. The letter informed the court of the facts listed above. During the sentencing hearing, the trial court stated that it had considered the letter and it found Rodriguez's difficult childhood to be a mitigating factor. The court imposed presumptive sentences, however, noting the aggravated DUI conviction had been Rodriguez's "fourth DUI in ten years, and . . . the second aggravated DUI." The court also stated: "Even though I have great sympathy for what you've gone through, I can't honestly say that based on the situation in front of me that I think the mitigated sentence is appropriate." Because the court gave due consideration to the evidence presented at sentencing, we cannot say it abused its discretion by imposing presumptive sentences. *See id.* ¶ 8 ("a sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration"); *see also State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983) (prior conviction used to impose enhanced sentence may also be aggravating circumstance).

Right to Jury Trial

¶12 Rodriguez also contends "the trial court's finding of prior convictions[,] rather than a finding by a jury, was unconstitutional because it violated Mr. Rodriguez's right to a jury trial." We have repeatedly held that a defendant's right to a jury trial is not violated

when the trial court, rather than a jury, determines whether he or she has prior convictions for purposes of sentence enhancement. *See State v. Robles*, 213 Ariz. 268, ¶ 19, 141 P.3d 748, 754 (App. 2006); *State v. Keith*, 211 Ariz. 436, ¶¶ 2-3, 122 P.3d 229, 229-30 (App. 2005); *Newkirk v. Nothwehr*, 210 Ariz. 601, ¶¶ 5-14, 115 P.3d 1264, 1266-67 (App. 2005). We therefore do not address this claim further.

Disposition

¶13 For the reasons above, Rodriguez's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge